

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

**IN RE:
BLUE CROSS BLUE SHIELD
ANTITRUST LITIGATION
(MDL NO. 2406)**

**Master File No. 2:13-CV-20000-RDP
This Document Relates to
All Cases**

**PROVIDER PLAINTIFFS' SUBMISSION ON SCHEDULE AFTER
THE ELEVENTH CIRCUIT'S DENIAL OF THE DEFENDANTS'
1292(b) PETITION**

The Provider Plaintiffs urge the Court to move the prioritized proceedings in this case to resolution as expeditiously as possible. In an effort to accomplish this goal, the Providers and Subscribers have worked together to develop the efficient schedule that is contained in their joint motion. By contrast, the Defendants have submitted a proposed schedule that would result in this litigation continuing to be the “very long process” that is their publicly stated desire.¹ The Court should reject their proposal.

¹ The statement issued by the Defendants after the ruling by the Eleventh Circuit was as follows: “The decision not to accept our appeal at this time was not unexpected, as pre-trial appeals are rare. This is another step in a very long process and we look forward to continuing to defend our case in the U.S. District court. We remain confident that we will ultimately prevail. . . .” J. Commins, “BCBS Antitrust Suit Appeal Rejected,” *Health Leaders* (December 13, 2018). If the Defendants had revealed to this Court their expectation that the appeal would not be accepted, instead of claiming that “[c]ertification is even more appropriate here than in an ordinary case,” Doc. No. 2085-1 at 4, we doubt that the Court would have granted the motion, leading to the eight-month delay that the Defendants created.

The fundamental problem with the Defendants' proposal is that the Defendants seek to depart from the approach in the Court's prior scheduling order that had merits reports and summary judgment proceeding while class certification motions and reports were underway. The Plaintiffs have collectively proposed a schedule that would complete class certification and expert reports, merits reports, and summary judgment by early 2020. A copy of the Court's most recently entered schedule is attached as Exhibit A for the Court's convenience. The approach of the Plaintiffs' proposal is to be consistent with the Court's prior schedule while using the efficiency benefits of the Court's *per se* ruling that the Eleventh Circuit has allowed to stand.

Before discussing the specific proposals, it is important to understand important considerations for the Provider Plaintiffs. Hospitals in the United States are facing enormous financial problems. Just this week, one of the class representative hospitals announced that it is closing, bringing the number of hospitals that have closed in Alabama to 13 since 2011. See Exhibit B, William Thornton, Another rural Alabama hospital closing, AL.Com, (February 12, 2019), <https://www.al.com/business/2019/02/another-rural-alabama-hospital-closing.html>; Exhibit C, WSFA Staff, Alabama to lose another rural hospital, (February 12, 2019), <http://www.wsfa.com/2019/02/11/alabama-hospital-closing/>.

lose-another-rural-hospital/. Hospitals in other states are also going out of business in record numbers. A number of additional hospitals in Alabama are in financial peril. Based on an Alabama Hospital Association survey, 88 percent of the rural hospitals were operating in the red". See Exhibit D, John Sharp, Avoiding 'ghost town': Saving Alabama's rural hospitals becoming a top campaign concern, (September 3, 2018), https://www.al.com/news/2018/09/avoiding_ghost_town_saving_ala.html. A significant part of the problem for hospitals is the low reimbursement paid by the local Blue, which is the largest commercial payor in Alabama, and almost always the largest commercial payor throughout the country. Because of the dire problems that hospitals face, it is crucial that at least the hospital portion of the Provider Plaintiffs complete this litigation including damages to get hospitals the relief this case can provide before many more of them go out of business.

With this background, the Plaintiffs have proposed that the class certification motions and expert reports be filed on April 15, with the merits expert reports following soon thereafter on May 15, and with one set of expert depositions to follow efficiency reasons. We have also included another thirty day period for any rebuttal experts used by the Plaintiffs to be deposed.

The Plaintiffs' joint proposed schedule would have the Court ready to hear class certification *and* summary judgment by next January. This schedule would mean that the case could be ready for trial by 2nd quarter of 2020.

By contrast, the Defendants have proposed a similar schedule² for class certification with a delay until after a ruling on class certification, first for merits expert reports some time well into 2020 after the ruling on class certification, after still another round of depositions of expert depositions, and then summary judgment motions, briefing and argument. The Defendants are continuing their publicly avowed goal of making this litigation "a very long process" and continuing their effort to make this case as expensive and inefficient as possible in their on-going war of attrition. The Court has already rejected this approach by the Defendants on at least two occasions. It should do so again.

The Court will note that in the Plaintiffs' proposed schedule, the Providers and Subscribers are taking a somewhat different approach to class certification. The Subscribers are proposing a liability and injunctive relief only trial in the first instance. The fact that the Providers are not taking the same approach in the proposed schedule should not be taken in any way as

² If the Court adopts the Defendants' approach, Plaintiffs ask that class certification begin on March 29, 2019.

criticism of bifurcation and/or issues certification. As stated above, hospitals are in dire need of relief, and completing the entire trial proceedings, including damages, expeditiously, is important for hospitals.³ The Providers will continue to consider how bifurcation and issues certification, perhaps along with requests for preliminary injunctive relief, can be used to make this litigation proceed more efficiently.

Finally, we also ask that the Court set a firm trial date for the class trial. We recognize that the Court previously rejected our request to do so, but we now have direction from the Eleventh Circuit. There is no better way to encourage the parties to complete litigation than to set a trial date.

Dated: February 14, 2019

Respectfully submitted,

/s/ Edith M. Kallas

Edith M. Kallas – **Co-Lead Counsel**
WHATLEY KALLAS, LLP
1180 Avenue of the Americas, 20th Floor
New York, NY 10036
Tel: (212) 447-7060
Fax: (800) 922-4851
Email: ekallas@whatleykallas.com

/s/ Joe R. Whatley, Jr.

Joe R. Whatley, Jr. – **Co-Lead Counsel**
W. Tucker Brown
WHATLEY KALLAS, LLP
2001 Park Place North
1000 Park Place Tower
Birmingham, AL 35203
Tel: (205) 488-1200
Fax: (800) 922-4851
Email: jwhatley@whatleykallas.com
tbrown@whatleykallas.com

³ At the Status Conference on January 15, 2019, the parties and the Court all agreed that the production of data after 2015 would not impact class certification. However, there will be a need to obtain necessary data after that time in advance of the trial. Therefore, we will need to plan for the production of that data far enough in advance of the trial for the experts to include it in their damage calculations. We plan to meet and confer with Defendants on an appropriate schedule for those productions once the Court sets an overall schedule.

Patrick J. Sheehan
WHATLEY KALLAS, LLP
60 State Street, 7th Floor
Boston, MA 02109
Tel: (617) 573-5118
Fax: (617) 371-2950
Email: psheehan@whatleykallas.com

Henry C. Quillen
WHATLEY KALLAS, LLP
159 Middle Street, Suite 2C
Portsmouth, NH 03801
Tel: (603) 294-1591
Fax: (800) 922-4851
Email: hquillen@whatleykallas.com

Charles Clinton Hunter
HAYES HUNTER PC
4265 San Felipe, Suite 1000
Houston, TX 77027
Tel: (281) 768-4731
Fax: (713) 583-7047
Email: chunter@hayeshunterlaw.com

Deborah J. Winegard
WHATLEY KALLAS, LLP
1068 Virginia Avenue, NE
Atlanta, GA 30306
Tel: (404) 607-8222
Fax: (404) 607-8451
Email: dwinegard@whatleykallas.com

E. Kirk Wood, Jr. – ***Local Facilitating Counsel***
WOOD LAW FIRM LLC
P. O. Box 382434
Birmingham, AL 35238
Tel: (205) 612-0243
Fax: (205) 705-1223
Email: ekirkwood1@bellsouth.net

Aaron S. Podhurst – ***Plaintiffs' Steering Committee***
Peter Prieto – ***Chair, Expert Committee***
PODHURST ORSECK, P.A.
25 West Flagler Street, Suite 800
Miami, FL 33130
Tel: (305) 358-2800
Fax: (305) 358-2382
Email: apodhurst@podhurst.com
pprieto@podhurst.com

Dennis Pantazis – ***Plaintiffs' Steering Committee***

Brian Clark – ***Discovery Committee***

WIGGINS CHILDS PANTAZIS

FISHER

GOLDFARB

The Kress Building

301 Nineteenth Street North

Birmingham, AL 35203

Tel: (205) 314-0500

Fax: (205) 254-1500

Email: dgp@wcqp.com

bclark@wcqp.com

U.W. Clemon – ***Plaintiffs' Steering Committee***

U. W. Clemon, LLC

5202 Mountain Ridge Parkway

Birmingham, AL 35222

Tel: (205) 837-2898

Email: clemonu@bellsouth.net

Dennis C. Reich – ***Chair, Damages Committee***

REICH & BINSTOCK, LLP

4265 San Felipe, Suite 1000

Houston, TX 77027

Tel: (713) 622-7271

Fax: (713) 623-8724

Email: dreich@rbfirm.net

J. Mark White – ***Litigation Committee***

Augusta S. Dowd – ***Chair, Litigation Committee***

Linda G. Flippo – ***Discovery Committee***

WHITE ARNOLD & DOWD, P.C.

The Massey Building

2025 Third Avenue North, Suite 500

Birmingham, AL 35203

Tel: (205) 323-1888

Fax: (205) 323-8907

Email: mwhite@whitearnoldanddowd.com

adowd@whitearnoldanddowd.com

lflippo@whitearnoldanddowd.com

Nicholas B. Roth – ***Chair, Discovery Committee***

Julia Smeds Roth – ***Discovery Committee***
EYSTER KEY TUBB ROTH
MIDDLETON
& ADAMS, LLP
402 East Moulton Street, SE
Decatur, AL 35602
Tel: (256) 353-6761
Fax: (256) 353-6767
Email: nbroth@eysterkey.com
jroth@eysterkey.com

David A. Balto – ***Expert Committee***

THE LAW OFFICES OF DAVID A.
BALTO
1350 I Street, N.W., Suite 850
Washington, DC 20005
Tel: (202) 789-5424
Fax: (202) 589-1819
Email: david.balto@dcantitrustlaw.com

Joey K. James – ***Litigation Committee***

BUNCH & JAMES
P. O. Box 878
Florence, AL 35631
Tel: (256) 764-0095
Fax: (256) 767-5705
Email: joey@bunchandjames.com

Van Bunch – ***Chair, Class Certification Committee***

BONNETT FAIRBOURN FRIEDMAN &
BALINT, P.C.
2325 E. Camelback Road, Suite 300
Phoenix, AZ 85016
Tel: (602) 274-1100
Fax: (602) 274-1199
Email: vbunch@bffb.com

Robert J. Axelrod – ***Chair, Written***

Submissions Committee
AXELROD & DEAN LLP
830 Third Avenue, 5th Floor
New York, NY 10022
Tel: (646) 448-5263
Fax: (212) 840-8560
Email: rjachelrod@axelroddean.com

W. Daniel Miles, III – ***Written***

Submissions Committee
BEASLEY ALLEN CROW METHVIN
PORTIS
& MILES, P.C.
218 Commerce Street
Montgomery, AL 36104
Tel: (800) 898-2034
Fax: (334) 954-7555
Email: dee.miles@beasleyallen.com

Richard S. Frankowski – ***Discovery Committee***

THE FRANKOWSKI FIRM, LLC
231 22nd Street South, Suite 203
Birmingham, AL 35233
Tel: (205) 390-0399
Fax: (205) 390-1001
Email: richard@frankowskifirm.com

Peter H. Burke – ***Class Certification Committee***

J. Allen Schreiber – ***Litigation Committee***
BURKE HARVEY, LLC
3535 Grandview Parkway
Suite 100
Birmingham, AL 35243
Tel: (205) 930-9091
Fax: (205) 930-9054
Email: pburke@burkeharvey.com
aschreiber@burkeharvey.com

John C. Davis – ***Written Submissions Committee***

LAW OFFICE OF JOHN C. DAVIS
623 Beard Street
Tallahassee, FL 32303
Tel: (850) 222-4770
Email: john@johndavislaw.net

Michael C. Dodge – ***Expert Committee***

GLAST PHILLIPS & MURRAY, P.C.
14801 Quorum Drive, Suite 500
Dallas, TX 75254
Tel: (972) 419-7172
Email: mdodge@gpm-law.com

Mark K. Gray – ***Discovery Committee***
GRAY & WHITE

713 E. Market Street, Suite 200
Louisville, KY 40202
Tel: (502) 805-1800
Fax: (502) 618-4059
Email: mgray@grayandwhitelaw.com

Michael E. Gurley, Jr. – ***Discovery Committee***

Attorney at Law
24108 Portobello Road
Birmingham, AL 35242
Tel: (205) 908-6512
Email: mgurleyjr@yahoo.com

Stephen M. Hansen – ***Class Certification Committee***

LAW OFFICE OF STEPHEN M.
HANSEN
1821 Dock Street
Tacoma, WA 98402
Tel: (253) 302-5955
Fax: (253) 301-1147
Email: steve@stephenmhansenlaw.com

Lynn W. Jinks, III – ***Expert Committee***

Christina D. Crow – ***Discovery Committee***
JINKS CROW & DICKSON, P.C.
219 North Prairie Street
Union Springs, AL 36089
Tel: (334) 738-4225
Fax: (334) 738-4229
Email: ljinks@jinkslaw.com
ccrow@jinkslaw.com

Harley S. Tropin – ***Damages Committee***
Javier A. Lopez – ***Discovery Committee***
KOZYAK TROPIN &
THROCKMORTON, P.A.
2525 Ponce De Leon Boulevard, 9th
Floor
Miami, FL 33134
Tel: (305) 372-1800
Fax: (305) 372-3508
Email: hst@kttlaw.com
jal@kttlaw.com

C. Wes Pittman – ***Settlement Committee***
THE PITTMAN FIRM, P.A.
432 McKenzie Avenue
Panama City, FL 32401
Tel: (850) 784-9000
Fax: (850) 763-6787
Email: wes@pittmanfirm.com

Robert B. Roden – ***Litigation Committee***
SHELBY RODEN, LLC
2956 Rhodes Circle
Birmingham, AL 35205
Tel: (205) 933-8383
Fax: (205) 933-8386
Email: rroden@shelbyroden.com

Gary E. Mason – ***Class Certification Committee***
WHITFIELD BRYSON & MASON, LLP
1625 Massachusetts Ave. NW, Suite 605
Washington, DC 20036
Tel: (202) 429-2290
Fax: (202) 640-1160
Email: gmason@wbmllp.com

Myron C. Penn – ***Discovery Committee***
PENN & SEABORN, LLC
53 Highway 110
Post Office Box 5335
Union Springs, AL 36089
Tel: (334) 738-4486
Fax: (334) 738-4432
Email: myronpenn28@hotmail.com

J. Preston Strom, Jr. – ***Litigation Committee***
STROM LAW FIRM, LLC
2110 N. Beltline Boulevard, Suite A
Columbia, SC 29204-3905
Tel: (803) 252-4800
Fax: (803) 252-4801
Email: petestrom@stromlaw.com

Thomas V. Bender – ***Discovery Committee***
Dirk L. Hubbard
HORN AYLWARD & BANDY, LLC
2600 Grand Blvd., Suite 1100
Kansas City, MO 64108
Tel: (816) 421-0700
Email: tbender@hab-law.com
dhubbard@hab-law.com

Gregory S. Cusimano – ***Litigation Committee***
CUSIMANO, ROBERTS & MILLS, LLC
153 South 9th Street
Gadsden, AL 35901
Phone: (256) 543-0400
Fax: (256) 543-0488
Email: greg@alalawyers.net

Michael L. Murphy – *Discovery Committee*
BAILEY GLASSER LLP
910 17th Street, NW, Suite 800
Washington, DC 20006
Tel: (202) 463-2101
Fax: (202) 463-2103
Email: mmurphy@baileyglasser.com

Lance Michael Sears
SEARS & SWANSON, P.C.
First Bank Building
2 North Cascade Avenue, Suite 1250
Colorado Springs, CO 80903
Tel: (719) 471-1984
Fax: (719) 577-4356
Email: lance@searsassociates.com

Jessica Dillon
Ray R. Brown
Molly Brown
DILLON & FINDLEY, P.C.
1049 W. 5th Avenue, Suite 200
Anchorage, AK 99501
Tel: (907) 277-5400
Fax: (907) 277-9896
Email: Jessica@dillonfindley.com
Ray@dillonfindley.com
Molly@dillonfindley.com

Cynthia C. Moser
HEIDMAN LAW FIRM
1128 Historic 4th Street
P. O. Box 3086
Sioux City, IA 51101
Tel: (712) 255-8838
Fax (712) 258-6714
Email: Cynthia.Moser@heidmanlaw.com

Brian E. Wojtalewicz
WOJTALEWICZ LAW FIRM, LTD.
139 N. Miles Street
Appleton, MN 56208
Tel: (320) 289-2363
Fax: (320) 289-2369
Email: brian@wojtalewiczlawfirm.com

Archie C. Lamb, Jr.
ARCHIE LAMB & ASSOCIATES, LLC
301 19th Street North, Suite 585
The Kress Bldg.
Birmingham, AL 35203-3145
(205) 458-1210
Email: alamb@archielamb.com

Paul Lundberg
LUNDBERG LAW, PLC
600 4TH Street, Suite 906
Sioux City, IA 51101
Tel: (712) 234-3030
Fax: (712) 234-3034
Email: paul@lundberglawfirm.com

Gwen Simons
Simons & Associates Law, P.A.
P.O. Box 1238
Scarborough, ME 04070-1238
Tel: (207) 205-2045
Fax: (207) 883-7225
Email: gwen@simonsassociateslaw.com